

# EXHIBIT A

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA

U.S. TOBACCO COOPERATIVE,  
INC., )  
 ) DOCKET NO. 5:19-cv-00430-BO  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
CERTAIN UNDERWRITERS AT )  
LLOYD'S, SUBSCRIBING TO )  
POLICY NUMBERS )  
B1353DC1703690000 AND )  
B1353DC1602041000 )

Defendants.

TRANSCRIPT OF SETTLEMENT CONFERENCE  
BEFORE MAGISTRATE JUDGE ROBERT T. NUMBERS, II  
MONDAY, MAY 3, 2021; 1:36 PM  
RALEIGH, NORTH CAROLINA

FOR THE PLAINTIFF:

McGuire Woods LLP  
By: Mark E. Anderson, Esq.  
Amy E. Dehnel, Esq.  
Shelby S. Guilbert, Jr.  
501 Fayetteville Street  
Suite 500  
Raleigh, NC 27601

FOR THE DEFENDANTS:

Hill Rivkins LLP  
By: James A. Saville, Esq.  
45 Broadway  
Suite 1500  
New York, NY 10006  
  
Clark, Newton & Evans, PA  
By: Seth P. Buskirk, Esq.  
Don T. Evans, Jr., Esq.  
509 Princess Street  
Wilmington, NC 27401

Audio Operator: CLERK'S OFFICE PERSONNEL

1 MR. EVANS: Good morning, Your Honor. Don Evans, I'm  
2 local counsel for the defendants, along with Seth Boskirk here  
3 who is also local counsel.

4 THE COURT: All right. Good afternoon, everyone.

5 MR. SAVILLE: Good afternoon, Judge.

6 So we're here on a -- related to a motion to compel  
7 that was filed by U.S. Tobacco in which I granted the order  
8 and set a hearing to discuss what sanctions, if any, are  
9 appropriate in this case given what occurred in the course of  
10 discovery.

11 Before we dig into the merits, I want to start by  
12 asking -- I'll hear from plaintiff's counsel first on this --  
13 what is the current status of discovery and the compliance  
14 with the order I entered?

15 MR. GUILBERT: Your Honor, we don't think that the  
16 defendants have complied with the court order, and I'd be  
17 happy to go into as much or as little detail as the Court  
18 would like this afternoon. We're prepared to walk through the  
19 responses. We've brought copies of the supplemental discovery  
20 requests that were submitted that, suffice it to say, we don't  
21 think that the defendants have complied with the order.

22 THE COURT: Well, let's start with -- just give me an  
23 overview of what your views of it since -- and, if necessary,  
24 we'll dig into it.

25 MR. GUILBERT: Okay. And we've got one slide that I

1 think people can help us walk through where we think things  
2 currently stand that, I think, provides a good overview. And  
3 if you'd like more detail as we get into this, I'm happy to  
4 provide it.

5           So I think that the first problem that we had with  
6 the responses is that we've been trying to get interrogatory  
7 responses from the defendants for a year and a half as Your  
8 Honor noted in the order. And the order that Your Honor  
9 entered on April 9th said that all of the defendants were  
10 supposed to actually respond to interrogatories. They were  
11 supposed to respond. They're supposed to submit verified  
12 interrogatory responses. So we don't think that the insurers  
13 have complied.

14           The responses that we were provided, and first of  
15 all, not verified. There's a red flag there.

16           Secondly, their joint responses submitted on behalf  
17 of all thirteen defendants in the case, we don't have  
18 individual interrogatory responses from all the defendants  
19 which is something that we've been asking for, and we've been  
20 told we were going to receive throughout the case, and don't  
21 really understand what's at issue there.

22           We do have, what appears to be, some slightly amended  
23 interrogatory responses. They look very similar to what we  
24 had received before, but they still have some of the same  
25 problems that we had with the first set of interrogatory

1 responses.

2 For example, there's still no explanation, we have an  
3 interrogatory -- standard interrogatory to explain the factual  
4 or legal basis for the defenses in the case. There is still  
5 no answer for, I think, affirmative defenses 3, 4, or 13.  
6 There's just no response.

7 So we think that certain of those defenses, at least  
8 now, we should be talking about striking defenses at this  
9 point if the insurers don't want to respond. And I think  
10 another issue that we noted when we were here in December is  
11 that -- I guess we were doing it virtually -- is that we have  
12 deposition testimony that is at odds with the answers in the  
13 interrogatories. You can't really reconcile the two. We  
14 thought that they were ordered to go back and amend the  
15 responses that that was going to be addressed. It has not  
16 been.

17 And what we've done -- and if I can hand this up to  
18 Your Honor.

19 I don't know -- do you have a copy first, Jim?

20 With our motion to compel that we filed -- I guess  
21 the second motion to compel, there is an exhibit C, Your  
22 Honor, that identified all the specific deficiencies with  
23 respect to each of the responses we had received. And I think  
24 what was done is we've taken what was exhibit C, we just added  
25 another column that explains why for each of the responses we

1 don't think that they've complied with what Your Honor ordered  
2 the insurers to do. So that's the story on interrogatory  
3 responses.

4 The order also addressed the need for the insurers to  
5 rectify certain issues that we have identified in December of  
6 2019 with the initial disclosure. So the insurers did not  
7 comply with the order which directed them to do so.

8 I think that the disclosure specifically that we've  
9 been focused on since December relates to reinsurance policies.  
10 We think that -- and as your order found, the insurers were  
11 required to disclose the reinsurance policies with their  
12 initial disclosure. They didn't do that. They've been  
13 ordered to do so, and they're disclosure now is just unchanged  
14 from what we had back in January of last year.

15 Now, we do know that they have some insurance or  
16 reinsurance policies. We'd like to see them, because there's  
17 a separate interrogatory response that says that insurers all  
18 maintain reinsurance programs that may be called upon to  
19 reimburse insurers. So we know they got them. They haven't  
20 given them to us.

21 And beyond that, they did not produce -- and we have  
22 a separate request for this. It was just related to the  
23 initial disclosures because we want the policies. We also  
24 want to see the reports that the claim adjusters have been  
25 submitting to the reinsurers. And those communications are

1 not privileged. We expect that there would be reports saying  
2 well, this is what we saw when we went out to the  
3 Cooperative's warehouses. This is what we think the loss is.  
4 These are the challenges with respect to the claim. They've  
5 been ordered to provide that information.

6 We saw one document that appeared to relate to the  
7 need to report to reinsurers. We don't have the reports,  
8 though. There should be if all the insurers have reinsurance  
9 that may be called upon to pay for damages that may be entered  
10 in this case, that may be awarded for bad faith and it's  
11 reinsurance for bad faith typically in these policies. We  
12 want to see what communications exist and we don't have them.

13 I think with respect to the document request and the  
14 production issues, I think there the insurers did not comply  
15 with the order there. Once again, instead of getting written  
16 discovery responses from each of the insurers, we had a joint  
17 amended response, and it's still -- it's filled with  
18 boilerplate objections. So if you look at the responses,  
19 they're almost identical to what we had before. Less than  
20 twelve general boilerplate objections. We have no idea what's  
21 still being withheld.

22 There were some additional documents that were  
23 produced. Some documents were produced, we don't know on  
24 behalf of which insurer. We think it's only from Aegis, but  
25 there's a Bates prefix, DEF. So presumably, those have been

1 produced on behalf of all defendant insurers. And there are  
2 about 600 additional pages as far as we can tell. The rest of  
3 the production, there are documents from Marine Reporting  
4 International which was a loss adjuster the insurers retained.  
5 They produced some additional documents. But what it looks  
6 like is that we do not, and we still do not have documents  
7 from all of the insurers. So there's no way to tell.

8 In fact, they keep saying there is an agreed upon  
9 electronically stored information order that says we're  
10 supposed to unitize documents, produce metadata. I mean, we  
11 don't have any of that either. So it's really hard for us to  
12 figure out where the documents did come from. We just have a  
13 few large PDFs. So it's really hard to reconcile where the  
14 documents came from.

15 The written responses that were amended do not  
16 identify Bates ranges of documents that have now been  
17 produced. I think the Court ordered that that was supposed to  
18 be included in the amended responses. It has not been.

19 I think the depositions that reveal very specific  
20 categories of responsive documents that have not been  
21 produced, and these are not just documents that would be nice  
22 to have. We've deposed the lead claim handler for AEGIS who  
23 said I got claim diary. Claim diary has not been produced to  
24 us. That's a core document that contained his work on claims  
25 investigation. Still don't have it. And the list goes on and



1 on, and that's detailed at exhibit E to this binder that, I  
2 think, did the same thing and went through each of the  
3 document requests and identifies why we think even at the  
4 April 9th order and supplemental production that we did  
5 receive that the insurers have not complied.

6 Now, Your Honor may remember that there was another  
7 category of documents the insurers were ordered to produce  
8 that relates to their mold expert, Dr. Heard, from London.  
9 And we did receive a copy of a draft cause and origin report  
10 that was drafted in 2018. So we did receive that. It was  
11 telling because the bottom line conclusion is that one -- a  
12 couple of the key defenses that the insurers have been  
13 asserting in this case that she thought back in 2018 that it  
14 would be speculative to reach the conclusion. It's one of the  
15 defenses that they've raised is that the mold that we found on  
16 our products started growing before it came into the  
17 warehouses and that mold is an inherent characteristic in  
18 tobacco. She said that she couldn't conclude that, and that  
19 would be speculative.

20 Now, that's not in her expert report that was  
21 submitted as an exhibit as a rebuttal expert report, but she's  
22 now a fact witness in this case, and we need to depose her.  
23 But the problem is we still don't have her documents. We've  
24 got a handful of emails that were sent from Paula Cook at  
25 Marine Reporting International back to Stephanie Heard, and a

1 couple of invoices. They identify a bunch of names of people  
2 that we had no idea were even working on this file. But we  
3 don't have those documents either.

4 I think that the privilege logs, those are still a  
5 mess. I think that what it looks like the insurers have done  
6 is I think the Court has overruled the work product objection  
7 based on the anticipation of litigation date. And what it  
8 appears that the insurers have done is that they've deleted  
9 work product claims, so that's out, but they just added the  
10 words "legal advice" to most of the entries on the log, and we  
11 got the privilege logs are also in the binder. It looks like  
12 the logs are shorter than they were before. So then it's a  
13 guess that some documents may have fallen off the log or  
14 they're not claiming privilege over them, but it doesn't  
15 appear that we have all those documents. Maybe, but there's  
16 really no way to tell because they did not do what was also in  
17 the order which was to say what documents are being produced,  
18 what documents are still being withheld. We can't really  
19 figure that out.

20 We are open to meeting and conferring with the  
21 insurers on that issue, but we'd like some direction from the  
22 Court to fix this in the first instance before we sit down and  
23 talk with them.

24 A couple other issues that we've identified. The  
25 Court ordered the insurers to produce information about

1 similar claims that these insurers have dealt with before,  
2 specifically related to mold issues under marine cargo  
3 policies, and also bad faith cases.

4 We asked for -- had interrogatory asking for all the  
5 bad faith claims in the last ten years. We have a specific  
6 document request for documents relating to interest coverage  
7 for mold damage claims.

8 They told us about one case that's pending now  
9 against Lloyd's in Lake Charles, Louisiana. It looks like it  
10 has nothing to do with mold. It looks like it has to do with  
11 an explosion that occurred. They're bad faith claims. So  
12 we're looking into that, but we expected that if they had any  
13 other claims like this that either tell us what they were, or  
14 they tell us they don't have them, that they don't have these  
15 types of claims, they ought to just be telling us that and  
16 that would be the way to address that issue. But we don't  
17 have documents for that case, and we don't think that they've  
18 responded.

19 Last couple issues, minor issues, but there was a  
20 direction from the Court with respect to some documents that  
21 plaintiffs inadvertently produced to the insurers. We did  
22 receive confirmation from Mr. Saville that his clients had  
23 complied with the Court's directive, but didn't really comply  
24 with the letter of the order. The order suggested that this  
25 needed to be verified under oath or under penalty of perjury

1 we got an affirmation of. I got no reason to doubt what Mr.  
2 Saville said in his affirmation, but just another example of  
3 noncompliance with the Court's order.

4 And similarly, with respect to the issue pertaining  
5 to Mitsui which is one of the defendants. We received an  
6 email from Mr. Saville stating that Mitsui states we agree to  
7 be bound with respect to Mitsui about emails they -- we assume  
8 he meant to say that Mitsui agrees to be bound by the  
9 testimony of MS Amlin in this case. That's not what the email  
10 said that we received, and we're happy to clear that up if  
11 that's what Mr. Saville intended to say that they intend to be  
12 bound by MS Amlin, we'll take him at his word. But this is  
13 another example of what we think is serial examples of  
14 noncompliance with the Court's directive.

15 So I think that just scratches the surface, and be  
16 happy to go into more detail, but I think that's it in a  
17 nutshell, Your Honor.

18 THE COURT: Mr. Saville, what do you say in response?

19 MR. SAVILLE: Your Honor, a couple quick things.

20 Everything that has to do with this case is me.  
21 Local counsel has nothing to do with it. They've been purely  
22 local in that regard. Gave me some guidance early on as to  
23 what to do. And if I had questions, they did a great job in  
24 complying with that.

25 Brody Karn is behind me. He's also with our firm.

1 separate issue, but there's been nothing there.

2 The privilege logs, we were very specific, Your  
3 Honor. We put them all out. We numbered them from 1 to 300,  
4 let's say, for entry. So we had some correlation to that.

5 On the revised privilege logs, we amended the  
6 responses, as we should, and based on the Court's orders we  
7 deleted line items. However, we kept the same numbering.

8 So when you looked at them, you could go all right, 1  
9 through 10 on the revised is 1, 7, and 8, so you knew exactly  
10 what documents were coming out of it. That's what we thought  
11 was the simplest and most direct way to address the issues  
12 with the privilege log in order that we can keep track of  
13 them.

14 With respect to the Heard documents, in accordance  
15 with the order, we have just given everything that's out there  
16 in terms of the Heard file. The same with the MRI (ph.)  
17 documents in terms of turning them over. A lot of those  
18 documents were within, I think, the scope of the privilege  
19 logs, so those have all been produced.

20 I'm having -- I realize that this is late in the day,  
21 Your Honor, but I'm happy to go through and designate by Bates  
22 numbers which documents came from which entry on the privilege  
23 log. It's -- they were pretty well described by to, from, cc,  
24 date, and topic. And as I mentioned, we took it out. And so  
25 therefore, you'd be able to just correlate the two. But if we

1           As one of the underwriters' representatives  
2 testified, this I under a Rutherford facility. So as soon as  
3 the lead agrees, it's automatic. There's nothing else that's  
4 done.

5           She testified that listen, I don't really know much  
6 about it. Here's the policy. I know who these guys are, but  
7 once the lead committed us to this under this particular  
8 facility, there is no choice.

9           This case has always been about whether moisture  
10 would be considered an external cause. That's it. Full stop,  
11 Your Honor. There's no debate as to any other issue from our  
12 perspective.

13           We've taken the view that moisture, ambient moisture  
14 is not an external cause. Obviously, U.S. Tobacco has taken a  
15 different view. All of this other information while clearly  
16 within a broad scope of discovery is totally irrelevant to  
17 that issue. Whether there's some underwriter down the chain  
18 has any information is not relevant to anything. They don't  
19 have a choice. And if they had an objection to the way the  
20 case was being handled, that would be sent up to the lead and  
21 that would have been produced, because that was within the  
22 scope of it. There had been no such documentation of that at  
23 all. And therefore, we believe we've complied with all the  
24 discovery requests.

25           The reason why we did a joint interrogatory response,

1 I'm happy to answer any questions you have.

2 THE COURT: Well, what U.S. Tobacco heard and what  
3 your -- what's the best way to go about resolving the concerns  
4 you have? Mr. Saville's telling me everything's been  
5 produced, so how do we satisfy you that that's correct?

6 MR. GUILBERT: Well, I think first of all, I  
7 understand now that there's no debate that this case is only  
8 about whether there was an external cause. If that's the case  
9 then the number of the insurer's primary defenses that it had  
10 not been explained or it should be stricken or withdrawn  
11 voluntarily by the insurers, for they just haven't answered or  
12 explained the basis for these defenses.

13 So for example, the affirmative defense number 3, in  
14 this case, says that the plaintiffs have not complied with  
15 conditions precedent to coverage and, therefore, there's no  
16 coverage in this case. No explanation for that in the  
17 interrogatory responses. It should be out at this point.

18 There was another contingent interrogatory, they  
19 didn't mention this one, that said if you contend that there  
20 was prejudice, that you're prejudiced by the timing of the  
21 notice in this case. Now, there's a late notice defense in  
22 this case, but very forgiving language in the policy that says  
23 that the insurers have to prove that they were prejudiced.  
24 They haven't answered that or explained the basis for how they  
25 were prejudiced. Those are the types of defenses that, I

1 would think if you're not going to answer them, they should be  
2 out.

3 THE COURT: I've got plenty to deal with with what  
4 I've got here. I don't necessarily want to open up a whole  
5 new can of worms, and if you feel like filing a Rule 11  
6 motion, go through the process to do that. If you feel like  
7 filing a motion for summary judgment, do ahead and do that.  
8 And that's all stuff that you can deal with. I'm talking  
9 about what we got here today.

10 I mean, Mr. Saville's talked about he's willing to  
11 put together thirteen different copies of interrogatory  
12 responses. Do you want that?

13 MR. GUILBERT: Well, I think that we should have  
14 responses from everyone, and not sure that those will be  
15 identical. I heard him to say that all of the insurers are  
16 bound. Well, we've deposed some of the insurers, not all of  
17 them.

18 We have, for example, one insurer who said that he  
19 disagreed with denials of request for admission that we  
20 understand have been prepared by AEGIS, the lead. So here,  
21 you've got a Following Market insurer who has a different  
22 understanding of the facts in this case. And that's why I'm  
23 suspect of the notion that we can just have a signature from  
24 each of the thirteen insurers and that's going to take care of  
25 the issue.



1 documents that are hard to decipher and match up with the  
2 privilege log.

3 Now, that's something that normally you would be able  
4 to work through in a meet and confer process, but they need to  
5 do it right the first time.

6 THE COURT: So what I've heard from Mr. Saville, or  
7 what I understand him to have said, was that they've now  
8 numbered everything that was on the privilege log and the  
9 things they've taken off, there should be a gap on the  
10 privilege log for whatever -- like I said, I think number 8 is  
11 no longer there. And what is your concern with that? I  
12 admittedly, have not reviewed that electronic discovery order  
13 recently, so maybe I'm just not remembering what's pertinent  
14 about it, but what is your problem with that method of  
15 production?

16 MR. GUILBERT: Because we can't match up what's come  
17 off the log and what supposedly has been produced to us with  
18 what the log had on it before. We just haven't been able to  
19 figure it out. Now, if they want to walk us through it and  
20 show that they've done it, then that's fine. But we've gone  
21 through that exercise with the defendants in this case  
22 multiple times. I think the last time we tried it was in  
23 November or December, and we didn't really get anywhere.

24 THE COURT: Mr. Saville, can you sit down with them  
25 and walk them through what's come off the log?

1 MR. SAVILLE: Mr. Karn and I will. Mr. Karn has the  
2 detailed knowledge of that. I don't -- I know how it worked,  
3 I don't know anything after that, Your Honor.

4 THE COURT: With respect to request for production,  
5 and what I've heard from U.S. Tobacco is the same concern over  
6 a joint response. Was individualized responses going to be --

7 MR. SAVILLE: We'll segregate them out, Your Honor.

8 THE COURT: All right. Have I covered all the issues  
9 that you've raised here?

10 MR. GUILBERT: Yes, Your Honor. And I think we went  
11 into much greater detail than -- if you could refer to exhibit  
12 E which is in your notebook. I think it goes point by point  
13 through each of the document requests on why we don't think  
14 that they're in compliance. So we'd still like them to  
15 comply --

16 MR. SAVILLE: Your Honor --

17 MR. GUILBERT: -- as they were directed to.

18 MR. SAVILLE: I'm sorry, Shelby.

19 Your Honor, I'll use that as a guide. I'll go  
20 through it.

21 THE COURT: Okay. All right.

22 Next item I had on my agenda was the role of local  
23 counsel here. Mr. Saville has noted that their role here is  
24 generally as uninvolved with what's going on here in terms of  
25 substance and simply --

1 on what he saw, Your Honor.

2 THE COURT: And you understand the sanctions that are  
3 available to the Court to punish noncompliance with discovery,  
4 right?

5 MR. SAVILLE: Fully do, Your Honor, yes.

6 THE COURT: And you understand among those are  
7 designating certain facts in the case as true?

8 MR. SAVILLE: Correct, Your Honor.

9 THE COURT: And you understand that the Court could  
10 prohibit a party from introducing certain matters into  
11 evidence?

12 MR. SAVILLE: Correct, Your Honor.

13 THE COURT: And you understand the Court could strike  
14 pleadings?

15 MR. SAVILLE: Yes, Your Honor.

16 THE COURT: And you understood that the Court could  
17 order entry of a default judgment?

18 MR. SAVILLE: Correct, Your Honor.

19 THE COURT: All right. Explain to me why there was  
20 such an issue with complying with the Court's local rules and  
21 the federal rules with respect to post-removal proceedings.  
22 There seem to be a number of missed deadlines and other things  
23 like that. What was the problem?

24 MR. SAVILLE: There was no problem per se, Your  
25 Honor. I think it was a day or so on corporate -- if I

1           MR. SAVILLE: I have no excuse for that, Your Honor.  
2 I couldn't tell you other than it was probably a holiday  
3 season, gathering information.

4           THE COURT: Well, what about filing the answer? I  
5 mean, the answer was late and there was repeated statements  
6 about we'll file it, we'll file it, and they reminded it, and  
7 you said we'll file it, and it never got filed. I mean,  
8 obviously, they didn't move for default there, and eventually  
9 you did get around to filing it, but what was the problem with  
10 getting it filed either on time or the way you told opposing  
11 counsel you'd do it?

12          MR. SAVILLE: There was no problem per se, Your  
13 Honor, other than the timing of it. And again, that is on me.  
14 That key to the meetings that were had, I don't remember those  
15 dates perfectly. But there were meetings ongoing. So as  
16 opposed to incurring the cost that might be incurred going  
17 forward, we dedicated the time and effort into seeing if we  
18 could set this up to have a meeting among the parties which,  
19 in fact, went forward.

20               So on its face, Your Honor, it clearly looks like I  
21 sat on my hands and did nothing for thirty days or sixty days  
22 or whatever that time frame is. Behind the scenes, however,  
23 there were sit-downs and discussions about the possibility of  
24 resolving the case with the plaintiff, and that's what was  
25 going on in the background at that time.

1 bound by the professional rules of this court, how do I -- how  
2 do I deal with that?

3 MR. SAVILLE: Your Honor, I have no explanation other  
4 than it's a time issue, and grossly underestimated what was  
5 required to take time on it and it just --

6 THE COURT: So you've taken a lot of this on  
7 yourself. In terms of -- as I look at the possible options of  
8 sanctions, there's, obviously, sanctions against attorneys and  
9 there's sanctions against parties. Do you care to opine on  
10 the division of the responsibility for the shortcomings that  
11 the Court has identified?

12 MR. SAVILLE: Your Honor, the shortcomings are all  
13 mine. I mean, I'm not making any statement -- any other  
14 representation other than that. There's -- that's on me.

15 THE COURT: Well, if that's the case, then why should  
16 we continue to allow you appear in this case?

17 MR. SAVILLE: Other than my representation that going  
18 forward I'm the attorney that's most familiar with it, I think  
19 the client would be prejudiced and then we'll -- you won't be  
20 seeing me stand up here again like this.

21 THE COURT: Why should I not refer this to the  
22 court's disciplinary process given the misrepresentations that  
23 have been made to the Court and the overall way discovery's  
24 been conducted here?

25 MR. SAVILLE: I don't believe that's necessary, Your

1 Honor. Discovery's been conducted in good faith. The  
2 representations were made in good faith. I understand the  
3 particular points that you brought up and it's just a question  
4 of -- it's always been a question of timing to get it done.

5 THE COURT: Well, we're here in May of 2021, and my  
6 understanding is these discovery requests were served in  
7 December of 2019. I mean, that's a long time for it to take  
8 to get a set of responses out. And it only -- it's taken two  
9 motions to compel to get things done, and it sounds like we're  
10 not even where we need to be in terms of getting responses  
11 out. So what would you -- how would you -- what's your  
12 position on why that's okay?

13 MR. SAVILLE: It's certainly not okay, Your Honor,  
14 and I -- other than my explanations to you, I don't believe  
15 it's okay. I don't believe that's the way the cases should be  
16 litigated. Unfortunately, this is one that went that  
17 direction.

18 THE COURT: Well, because, I mean, I've got -- we are  
19 an incredibly busy court. We have many litigants in front of  
20 us, and I'm trying to figure out in terms of dissuading other  
21 litigants from taking this course of action here, how do I  
22 make it known to the public at large, the bar at large, that  
23 this sort of conduct is not acceptable in this court in terms  
24 of discovery and taking four -- what, fourteen, sixteen months  
25 to respond to discovery.

1 believe -- it couldn't be a just result in terms of where we  
2 are right now.

3 THE COURT: Well, since U.S. Tobacco's had to wait  
4 well over a year to get discovery, why wouldn't it be fair? I  
5 mean, whether it's -- you are -- you claim it's your fault,  
6 but the client hired you and they have to bear with the  
7 decisions you make. And here, it appears that for one reason  
8 or another, we're now sixteen months into this, seventeen  
9 months into this, and they still don't have the discovery  
10 responses that they are entitled to. And so perhaps your  
11 client needs to suffer the consequences of their attorney's  
12 actions in this case.

13 MR. SAVILLE: I don't believe the remedies of default  
14 or striking particular pleadings or affirmative defenses or  
15 discovery after a certain date would be an appropriate remedy  
16 in this particular case.

17 The depositions have been done. The documents have  
18 been produced. Experts have done reports. And we're at that  
19 point, Your Honor. If there's any penalty, it should lie at  
20 my feet, not in terms of penalizing the client in striking an  
21 answer or a default or anything along that line. That  
22 wouldn't be fair or equitable in this circumstance at all.

23 THE COURT: Well, it guess it depends on how you look  
24 at it. I mean, it seems -- from what I've seen -- and I  
25 expressed this in my order -- it seemed that you or your

1 clients didn't think you had to comply with the rules of  
2 discovery at all. It seemed like it was totally optional on  
3 whether you wanted to do it or not, and only when pressed did  
4 you do anything. So if that -- if that's the case, how do  
5 I -- what message to I send to the bar if I just say, oh,  
6 here's some attorneys' fees. On the whole, it's -- it doesn't  
7 seem to send the right message if there's not an extreme  
8 penalty here.

9 MR. SAVILLE: I believe the attorneys' fees or  
10 shifting the costs is an extreme message in this circumstance,  
11 Your Honor.

12 THE COURT: As I reviewed U.S. Tobacco's pleadings,  
13 they always ask for whatever other sanctions the Court  
14 imposed. I mean, what is USTC's position on appropriate  
15 sanctions here, and if you think it's something like default  
16 or limiting evidence or limiting pleadings, what prejudice has  
17 your client suffered?

18 MR. GUILBERT: Your Honor, our client has incurred a  
19 lot of fees just chasing the insurers' trying to responses to  
20 discovery requests. And I'd be happy to put together what  
21 that looks like in terms of time and costs to file multiple  
22 motions to compel, try to meet and confers, send deficiency  
23 letters. So that's something that we could put together, and  
24 I think that is real prejudice. But I think beyond that, our  
25 clients are eager to move the case forward.



1           So I think that one sanction that the Court might  
2 consider is, I think at this point, this really should be the  
3 trial around damages and a trial about bad faith at this  
4 point.

5           I think that we're not getting discovery about the  
6 affirmative defenses in this case that have been asserted, and  
7 at some point, we should just move forward to a damages trial.

8           THE COURT: Well, I mean, you mention the fees and  
9 all that, I certainly don't quibble with that, but is there  
10 any other prejudice that your client has suffered?

11           MR. GUILBERT: I think prejudice is the time value of  
12 money and -- we do have a claim for pre-judgment interest in  
13 this case. We do have a bad faith claim in this case. It's  
14 one of the remedies you get for this type of conduct, and as  
15 to the treble damages penalty, we intend to seek that. But I  
16 think just to -- having to wait and wait and wait, I think, at  
17 some point it's more than just fees. And I think that it does  
18 get harder as more time goes by with witnesses and people who  
19 knew on the insurer's side haven't been to the site in five  
20 years. Maybe we can cross-examine them and do that at trial  
21 to establish that they don't remember or don't have a  
22 recollection and the jury can do with that what it may, but I  
23 think the more time that goes by it gets harder to try this  
24 case.

25           THE COURT: Realistically, who is -- who does the

1 damages award go to if you were to prevail at trial, right?  
2 Obviously, USTC, but then what happens to that money? Does it  
3 go to the various cooperative -- members of the cooperative or  
4 what happens to that?

5 MR. GUILBERT: And Your Honor, I don't know where the  
6 funds would go once it goes to the cooperative, or what they  
7 do with the funds. I know they've got a board of directors  
8 now and they would be looking at that.

9 THE COURT: And which affirmative defenses do you  
10 contend should be stricken at this point?

11 MR. GUILBERT: Oh, I think most of them, Your Honor.  
12 I think I mentioned some by specific number earlier where  
13 there was just no response from any of the insurers. And keep  
14 in mind here that twelve -- and it's still our position that  
15 twelve of the thirteen never answered interrogatories  
16 including interrogatories didn't even state the basis for the  
17 claims or defenses in this case.

18 So twelve of thirteen haven't answered. We got  
19 answers that aren't under oath as they were ordered to do.  
20 We've got some where they just chosen not to answer at all  
21 whether these affirmative defenses. Maybe they're just to --  
22 there was a little bit of kitchen sink approach with the  
23 answer that we received. Some defenses that hadn't been  
24 articulated in prior coverage letters, but they're in the  
25 answer, right. And sure, we could file a motion for summary

1 judgment, but if they're not going to answer and explain the  
2 basis for the defense after being asked to do so for fifteen  
3 months, at some point those defenses should be out of the  
4 case.

5 I think that there is a -- I mentioned a notice  
6 defense. I think that there's now deposition testimony that  
7 can't be reconciled with the defense. So that's one that I  
8 think should be gone.

9 We thought that when we got the amended responses  
10 that they would explain -- either explain the basis for that  
11 defense or how to reconcile the testimony or it would be out,  
12 but that's not what happened.

13 There's a duration of cover exclusion in the  
14 insurance policy that they have to clearly establish. And  
15 that the mold was growing on the tobacco before it came into  
16 the warehouse.

17 We got the lead claim adjuster in his deposition said  
18 that he could not clearly establish that the mold started  
19 growing on the tobacco before it entered the warehouse.  
20 That's 30(b)(6) are out.

21 We also now have the Heard report saying it could be  
22 speculative to reach that conclusion, and that was her report  
23 that was hidden from us for the last two years that we didn't  
24 get until we got your order two weeks ago. So that's another  
25 type of defense and the list goes on.

1           There's an inherent vice argument that tobacco is  
2 just inherently moldy and there's an inherent vice. Well, we  
3 now know that from a handful of the new documents that were  
4 produced to us that insurers, after this loss occurred,  
5 thought about adding an inherent vice exclusion to the policy.  
6 It's not in ours. But those are the types of defenses, that  
7 if they're going to go back and seriously redo the  
8 interrogatory responses, some of those defenses should be out  
9 of the case now, or they should explain how they plan to prove  
10 them, but they haven't done either. They haven't reconciled  
11 them with the testimony, the documents, and I don't think that  
12 they can. So those should be out.

13           THE COURT: Anything else U.S. Tobacco wants to add  
14 to that?

15           MR. GUILBERT: No, Your Honor. Anyone else?

16           THE COURT: Mr. Saville, anything else on your behalf  
17 or on behalf of the clients?

18           MR. SAVILLE: Your Honor, the only last thing is the  
19 interrogatory responses, we believe, with respect to the  
20 affirmative defenses, I think, as Mr. Guilbert might have  
21 pointed out, there's one that says we incorporate the terms  
22 and conditions of the policy. One is a condition precedent  
23 which is out because we haven't responded -- not that we  
24 haven't responded to, but we don't believe there was any issue  
25 with that.

1           But with respect to the others, they've all been  
2 identified in here in terms of the reason and the factual  
3 basis for why they've asserted them. And there's been six  
4 witnesses or five witnesses that have explained ad nauseum the  
5 basis for all those assertions. So with that, Your Honor,  
6 there's nothing further. Thank you.

7           MR. GUILBERT: I think, you know, one thing that I've  
8 omitted is that I think at some point we -- and depending on  
9 which defenses are in the case, there may be some need for us  
10 to supplement our expert reports that we had submitted. We  
11 were in the process of expert discovery when Your Honor  
12 decided to hold the case in abeyance while we resolved these  
13 issues. I think that amendment with some of the documents we  
14 received, I think that we might want to supplement some of our  
15 reports. In particular, our bad faith expert. And also one  
16 of our experts on some of the mold information we have from  
17 Dr. Heard.

18           We don't think that that should entitle the insurers  
19 at this point or another round of rebuttal expert reports. We  
20 want to get this case moving, but that's something else that  
21 we will need to do. We spent a lot of money in the first  
22 round trying to put all that together. And there are,  
23 probably, one or two other depositions that we're going to  
24 need just from a fact deposition prospective. So we'll have  
25 to build that into the schedule.

1 the Court's viewpoint. And I'm obviously not privy to  
2 conversations between local counsel and out-of-state counsel,  
3 but certainly part of the role of local counsel is conveying  
4 the court's expectations of foreign counsel to them, and  
5 certainly this does not appear to -- this conduct does not  
6 comply with this Court's expectations, and it would be my hope  
7 that local counsel would note that for foreign counsel. And  
8 even though they're not subject to sanction, still it's your  
9 role to do more than simply be a drop box for out-of-state  
10 counsel, particularly when things like this are going on that  
11 indicate conduct that is really detrimental to the  
12 administration of justice.

13 I'm going to take this matter under advisement and  
14 issue an order in the near term outlining what the sanctions  
15 here will be.

16 Since the parties are here, they should meet and  
17 confer on any outstanding issues, the ones we discussed here  
18 today, and try to reach a resolution promptly.

19 While I'm not a hundred percent certain how I'm going  
20 to rule here in terms of sanctions, if there are any further  
21 discovery disputes, both parties -- or discovery issues,  
22 failure to comply with my orders, and that sort of thing, the  
23 parties should be aware that all sanctions are on the table.

24 It's a default judgment if the plaintiffs were to run  
25 afoul of the rules, and a dismissal of the complaint. This

1 case needs to move forward promptly. It needs to do so  
2 without further difficulty. And it's my expectation that all  
3 the attorneys as officers of the court and as professionals  
4 will get it done, and that clients on either side will not  
5 stand in the way of further discovery occurring in a timely  
6 manner. So that will be all for today. We'll be in recess.

7 THE CLERK: All rise. This court is now in recess.

8 (Court is adjourned)

9 \* \* \* \* \*